UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NATIONAL ASSOCIATION OF LETTER CARRIERS BRANCH 361, AFFILIATED WITH NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, CLC (UNITED STATES POSTAL SERVICE),	:	Case No. 09-CB-202214
Respondent,	:	
and	:	
LESLIE DENISE WELLS, AN INDIVIDUAL,	:	
Charging Party.	:	

RESPONDENT'S ANSWERING BRIEF TO THE GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Respondent National Association of Letter Carriers Branch 361 ("the Branch" or the "Union") respectfully submits this response pursuant to 29 C.F.R. § 102.46(b) to the General Counsel's Exceptions and Supporting Argument and Citations (the "Exceptions") to Administrative Law Judge Andrew Gollin's May 4, 2018 decision in the above-captioned proceeding (the "Decision"). For the reasons set forth below, the Exceptions should be denied and the Decision affirmed.

I. SUMMARY OF THE ALJ'S DECISION

The Decision arose from the General Counsel's complaint that the Branch breached its duty of fair representation ("DFR") to Charging Party Leslie Denise Wells by failing to file and process two grievances on her behalf: one concerning her employer, the United States Postal Service ("USPS" or the "Postal Service") working Wells beyond her medical restrictions (the "Restrictions Grievance") and a grievance concerning the Postal Service's removal of Wells from her four-hour shift (the "Removal Grievance"). Decision at 1.

A. *The ALJ's Factual Findings.*

The case arose after Wells, a letter carrier who began employment with the USPS in 2015 and was represented at all relevant times by the Branch, transferred to a station known as Gardenside in Lexington, Kentucky in late February, 2017. Decision at 3:21-40. A few days after Wells began working at Gardenside, she reported pain and swelling in her left ankle, which had been previously injured, and on March 1, 2017 provided USPS management a copy of a document from her physician limiting her to "4 hours of standing and walking per shift." Decision at 4:14-32. The Branch and the USPS are parties to a "National Agreement" and a

"Local Memorandum." Decision at 2:25-30; 3:8-10; Jt. Exhs. 1 and 2.[1] Those agreements provide that a letter carrier may work a reduced workload, known as "light duty," on a temporary basis upon submission of appropriate medical documentation and if the Postal Service, in its reasonable discretion, determines that there is productive work available consistent with the employee's medical condition. Decision at 8:10 n.11. After Wells provided her medical documentation, a USPS supervisor, Amanda Boblitt, orally agreed to allow Wells to work four hours a day rather than the usual eight. Decision at 4:31-34. This meant that other carriers would have to deliver the mail on her route that she was unable to deliver, and the other carriers would often earn overtime as a result. Decision at 4:39-5:8.

Wells began to have issues delivering the mail assigned to her within the daily four hours walking restriction set forth in her physician's report and, the ALJ found, "at some point" complained to Branch Steward Mark Whitcomb that she believed she was being required to work[2] longer than her restrictions permitted. Decision at 10:21-22. The ALJ also found that Whitcomb never agreed to file a Restrictions Grievance. Decision at 10:30. He similarly found that Wells asked Branch Vice President David Blackburn for assistance with this matter, but that he never agreed to file a grievance on her behalf either. Decision at 10:39-49. In response to Wells' complaints, Blackburn advised her that she should file a request for light duty in order to work a reduced workload. Decision at 8:8-10; 11:6-9.

As time passed, Wells was performing progressively less work per day, and

[1] References to the hearing record in this brief use the same abbreviations in the Decision. Decision at 1 n.1

[2] Wells, as the ALJ found, was apparently confused as to whether her restrictions permitted her to only walk (or stand) for four hours a day, or whether they said she could only *wor*k for four hours, regardless of how much of that time was walking or standing. Decision at 10:1-11.

taking more time to complete her assignment. Decision at 7:20 n.10. On May 18, 2019 the Postal Service requested that Wells provide updated medical information, but she did not do so until June 27, 2017. Decision at 6 n.8. By May 27, 2017, it became clear to USPS that continuing to address Wells' situation in the manner it had would cost the Postal Service significant overtime, and might result in further injury to Wells, so USPS Finance Manager James Carl decided to remove Wells from her reduced work schedule. Decision at 7:20 n.10. Wells then contacted the Union and after a series of phone calls and text messages with various Branch officials, on June 1, 2017 Wells submitted the light duty request as Blackburn had previously advised her to do. Decision at 8:8-11; 11:4-9.

In a subsequent text message conversation with Branch President Kenneth Becraft[3] on June 9, 2017, Becraft explained to Wells that absent an approved light duty request, she had no entitlement to a reduced workload, USPS should not have permitted her to work one, and that a light duty assignment would be one consistent with her restrictions. Decision at 8:15-9:4. Wells responded "Ok that's so clear now!" Decision at 9:10. After submitting her light duty request, Wells provided USPS additional medical documentation stating she could perform only two hours of standing work, then two hours of walking, with a break in between; the Postal Service denied Wells' light duty request and the Branch filed a grievance over that denial. Decision at 9:10-16. The Branch and USPS settled the grievance with an agreement that future light duty requests would be considered based on the availability of productive work and in Wells' case, there was no such productive work available consistent within her restrictions, which at this point were even more limiting than the restrictions she submitted initially. Decision at 9:15-21. Wells then made a second light duty request with additional

[3] The hearing transcript, and therefore the Decision, spell Becraft's name as "Beecraft."

documentation, which indicated her restrictions were permanent, the USPS denied the request, and the Branch decided not to grieve that denial because a permanent light duty assignment requires five years of service and Wells had fewer than three. Decision at 9:21-27.

B. *The ALJ's Conclusions.*

The ALJ concluded that the Branch did not breach the DFR because its decision not to file the grievances was based on a reasonable, good-faith interpretation of the collective bargaining agreements, Decision at 12:45-49, and noted that Wells' desired grievances would have lacked merit under the National Agreement and Local Memorandum. Decision at 11:42-12:14. The ALJ also concluded that the Branch did not breach the DFR by misleading or misinforming Wells because no Branch official had agreed to file either the Restrictions Grievance or the Removal Grievance, and Becraft explained to her why the grievances would not have been successful and Wells indicated she understood his explanation. Decision at 12:16-33. The ALJ also found that the Union reasonably concluded, after grieving the USPS's denial of Wells' light duty request, that it could not further assist her under the national and local collective bargaining agreements. Decision at 12:34-41.

II. THE GENERAL COUNSEL'S EXCEPTIONS LACK MERIT AND SHOULD BE DENIED.

A union breaches its duty of fair representation when it engages in conduct affecting employees it represents which is arbitrary, discriminatory, or in bad faith. *Rainey Sec. Agency*, 274 NLRB 269, 270–71 (1985). However,"[s]omething more than mere negligence is required for union action or nonaction to be considered arbitrary." *Truck Drivers Local 692*, 209 NLRB 446, 448 (1974). Here, the ALJ correctly held that the General Counsel failed to carry his burden of establishing that "something more."

A. *The ALJ Did Not Err in Finding that the Union Did Not Breach the DFR By Failing to Pursue Meritless Grievances.*

The General Counsel's first exception takes issue with the ALJ's conclusion that the Branch's failure to file grievances on Wells' behalf was not a breach of its duty to Wells because its decisions not to process the grievances were based on a reasonable interpretation of the applicable collective bargaining agreements and a good-faith evaluation of the merits of the grievances. Exceptions at 1, Heading 1.[4]

The General Counsel largely ignores the evidence and the ALJ's basis for this conclusion. With respect to the Restrictions Grievance, the ALJ noted that Branch President Kenneth Becraft on June 9, 2017 sent Wells a text message, which explained to her that "absent being approved for light or limited duty, she was not contractually entitled to work a reduced workload/schedule and the USPS should not have allowed her to do so." Decision at 12:29-33. Thus, the Branch did in fact consider the merits of Wells' desired Restrictions Grievance and concluded that such a grievance would have had no merit under the applicable collective bargaining agreement, as ALJ Gollin properly concluded. Decision at 12:45-47. As for the Removal Grievance, the ALJ found that "following [Wells'] removal, the Union advised Wells to apply for light duty and provided her with information on how to do so." Decision at 12:34-35. Then, after she applied for light duty and the USPS denied the request, the Branch grieved the denial. Under Wells' new restrictions, two hours standing and two hours' walking, there was no productive work she could do, so the Branch resolved the grievance. Decision at 12:36-40. Thus, the ALJ held, the "Union reasonably concluded that there was nothing more that it could

[4] The General Counsel's Exceptions do not distinguish between the Restrictions Grievance (a grievance challenging the USPS's alleged forcing of Wells to work more hours than her restrictions allowed) and the Removal Grievance (a grievance challenging the USPS's removal of Wells from her shift on May 27, 2017) and refer to "grievances" generally.

do for Wells under the National Agreement or the local Memorandum of Understanding." Decision at 12:40-41. Accordingly, with respect to both grievances, the ALJ correctly concluded that the Union considered them and reasonably decided that they were not supported by the governing collective bargaining agreements.

The General Counsel argues that the record supports a finding of a breach of DFR because "Whitcomb offer[ed] no reason for his actions, or lack thereof" and "there is no testimony from Blackburn that he considered Wells' complaints or made any evaluation as to the merits of those complaints." Exceptions at 3. First, the General Counsel offers no support for his suggestion that the ALJ should have focused on the testimony of Whitcomb or Blackburn, subordinate Branch officials, when the record contains a clear contemporaneous explanation from the Branch President as to why the Branch did not file grievances on Wells' behalf, an explanation that Wells said clarified matters for her. Decision at 12:33. Moreover, "[a union official's] inability to provide a substantial justification for his failure to notify [charging party of the decision regarding a grievance] means nothing more than that [the official] was negligent." *Office Employees Local 2*, 268 NLRB 1353, 1356 (1984), *affd. sub nom. Eichelberger v. NLRB*, 765 F.2d 851 (9th Cir. 1985).

The General Counsel, in the face of the Union's evidence as to why it viewed Wells' grievances as meritless, however, attempts to manufacture the "something more" than negligence necessary to breach the DFR out of the passage of time, arguing that "Respondent simply did nothing for months regarding Wells' complaints" and that the union's "protracted inaction undoubtedly constituted something more than mere negligence" because "Wells initially apprised Respondent of her concerns and requested assistance in March." Exceptions at 5. This is a blatant mischaracterization of the record and the Decision. Contrary to the General

Counsel's assertion, the ALJ made no finding as to precisely when Wells complained that she was supposedly required to work in violation of her medical restrictions. ALJ Gollin certainly did not find that Wells made such a request "in March," as the General Counsel asserts. *See* Decision at 10: 28-29 ("I credit that, *at some point*, Wells told Whitcomb about what she believed was occurring and asked for his assistance[.]") (emphasis added). And, of course, Wells could not have requested assistance regarding her removal prior to May 27, the date she was removed.

Moreover, the General Counsel does not cite any authority to support his argument that "continued inaction" alone somehow rises above mere negligence. Indeed, Board precedent is precisely the opposite. "Protracted inaction," absent a showing of unlawful discrimination or animus, does not rise above negligence.[5] *Rainey*, 274 NLRB at 270–71 (1985) ("Respondent Union's delay in appointing a union steward and its failure to maintain reasonable contact with employees . . . in light of all the circumstances, including the absence of animus toward and discriminatory treatment of employees, [is] an ineptitude or mismanagement on the Union's part which we cannot equate with action which is 'arbitrary,' 'irrelevant, invidious, or unfair.'"). *See also Office Employees Local 2*, 268 NLRB at 1356 n.14 ("We also deem it significant that in *Great Western* the union's negligence alone rendered the grievance untimely, yet no violation was found.")(

Finally, the General Counsel's authorities do not support his first exception and

[5] Indeed, the General Counsel's position is nonsensical under these facts. This is not an instance where the union filed a grievance it believed had merit but delayed doing so until it was no longer timely under the collective bargaining agreement, or represented that it would take an action, and delayed taking that action for a lengthy period of time. The Branch never filed Wells' desired grievances at all and never told her that it would. Decision at 10:30-31; 11:2-3. It thus makes no sense to speak of "protracted inaction" here as if it somehow constitutes the "something more" that is necessary to breach the DFR.

are inapplicable to the facts of this case. In *SEIU Local 3036 (Linden Maint. Corp.)*, 280 NLRB 995, 996 (1986), the Board held that "[o]nce the Respondent *agreed to process* [the charging party's] grievance, it was obligated to handle the grievance in accordance with the standards imposed by its duty of fair representation." *Id.* at 996 (emphasis added). The fact that several union officials had represented to the charging party that his grievance would be processed to arbitration was fundamental to the Board's holding. *Id.* Similarly, in *Service Employees Int'l Union Local 79 (Convacare of Decatur),* 229 NLRB 692, 695 (1977), there was an explicit finding that a shop steward "undertook, intentionally or otherwise, to represent [the charging party]." at step one of the grievance procedure." And, "[h]aving undertaken that responsibility, [the steward] became obligated to represent [the charging party] fully and fairly and to function as her advocate." *Id.* Indeed, the General Counsel implicitly acknowledges this when he states that a union has "engaged in something more than mere negligence when it *abandons* an employee's grievance and offers no explanation for its action." Exceptions at 5 (emphasis added). Here, of course, no grievance was "abandoned," because the Branch never filed Wells' desired grievances, and Branch President Becraft explained to her why it had not. Decision at 12:29-32. Moreover, as discussed further below, the ALJ specifically found that no Union official represented to Wells that the Branch would process grievances on her behalf. Decision at 10:30-31; 11:2-3.

Even further afield from this case, *Teamsters Local 315 (Rhodes & Jamieson),* 217 NLRB 616 (1975) did not even involve a grievance. There, the employer indicated that it would eliminate delivery driver jobs, and the union held a vote amongst its membership as to whether the individuals holding those jobs should be reassigned to a different job classification, with full seniority, even though the collective bargaining agreement provided that when jobs

were eliminated, employees would be reassigned with full seniority so long as they were qualified. *Id.* at 616. The Board held this breached the DFR because the union delegated its decision-making authority to its membership and presented the issue to be decided in a "grossly inaccurate" and "substantially incomplete" manner and was thus unfair. *Id.* at 618-19. There was no such delegation in this matter, and, as the ALJ found, no deceit or misleading conduct by the Branch.

B. *The ALJ Did Not Err In Concluding that the Union Did Not Breach the DFR Because It Did Not Mislead or Misinform Wells about Her Desired Grievance.*

The General Counsel next complains about the ALJ's conclusion that the Union did not agree or commit to Wells to file her desired grievances, asserting that he "is not aware of any authority that requires Respondent to commit to filing a grievance before its conduct can be evaluated under duty of fair representation standards." Exceptions at 6. This framing misrepresents the ALJ's well-supported conclusion and the record. It was undisputed that there was no evidence of discriminatory animus or some other improper motive with respect to the treatment of Wells' situation by the Branch, and the General Counsel accordingly bore the burden to establish "something more" than "negligent action or nonaction." *Truck Drivers Local 692*, 209 NLRB at 448. One way to show that "something more" is to show that a union official deceived a member about whether it would or had filed a grievance or otherwise made a material misrepresentation about the status of the grievance. The Complaint did not allege any such deceit, the General Counsel did not present any evidence of deception, and the ALJ did not err in simply noting that no such evidence was in the record.

The General Counsel also asserts that the Branch "had a duty to inform Wells of its decision regarding her requests and not lead her on" and suggests that the Branch "willfully misinform[ed] [Wells] about her grievance" or "willfully [kept her] uninformed about [her]

grievance." Exceptions at 6. The General Counsel presented this theory that the Branch misled Wells about the status of her grievances for the first time in his post-hearing brief to the ALJ. As the ALJ found, it was never pleaded nor did the General Counsel present any evidence of deceit by the union. Decision at 12:22-24 ("There is no allegation in the complaint, or evidence in the record, that the Union willfully misinformed Wells, or kept her uninformed about any grievance."). Accordingly, the General Counsel is precluded from raising it now. *In Re Local 190, Laborers Int'l Union of N. Am.*, 355 NLRB 532, 534 (2010) ("[W]ere we to remand this case for the judge to address the heretofore unlitigated theory, we would be giving the General Counsel an unwarranted 'second bite of the apple' by permitting litigation of an issue that he has effectively chosen not to pursue.").

In any event, the ALJ explicitly found that Branch representatives *did not* mislead or misinform Wells about how the Branch was dealing with her desired grievances. Decision at 12:22-24. There is nothing in the record to support such a finding, and the General Counsel does not cite any such evidence in his exceptions. Indeed, it bears note that the General Counsel misrepresents the record to support this novel argument. He falsely asserts that Linda Dunn was a Union steward at the time Wells contacted her to complain about her situation. Exceptions at 7. In fact, the ALJ found that she "had been" a steward, Decision at 5:24 n.7, and the undisputed record testimony is that Becraft removed Dunn from her Steward position in December 2016, months before Wells transferred to Gardenside. Tr. at 470:2-15. In addition, the General Counsel cites Wells' contacts with David Mudd, but even the General Counsel concedes that Mudd was an "International Representative," not an agent of the Branch, which is the Respondent here, Exceptions at 7, and the record is clear that Mudd works for the International and the Branch has no power to direct him. Tr. at 514:12-515:7.

Moreover, even if Dunn and Mudd were agents of the Branch, the statements cited by the General Counsel do not indicate a promise to file grievances on Wells' behalf, and the ALJ did not err in concluding that the Branch made no such commitment. Dunn asking Wells "you still don't have a grievance filed?" is not a statement agreeing to file such a grievance, nor is Mudd's purported statement he would contact the Branch "for purposes of addressing her concerns" a representation that he or the Branch would file a grievance on her behalf. Exceptions at 7. Everyone involved, including Wells after June 9, 2017, understood that an accommodation of her medical restrictions would require an approved light duty request.

C. *The ALJ Did Not Err In Considering Whether the Grievances Would Have Had Merit.*

The General Counsel's third Exception attacks the ALJ for addressing the merits of Wells' desired grievances, and asserts that the merits of those grievances are "immaterial" and a "determination as to the merits of the grievances can only be made at the compliance hearing" and essentially accuses the ALJ of engaging in a results-oriented "attempt to justify Respondent's inaction." Exceptions at 8-9. The General Counsel again fails to understand the Decision. The ALJ cited the provisions of the collective bargaining agreements that allow letter carriers to work a reduced schedule or workload, and that Wells had not meet the requirements for them, in the course of concluding that "Union President Beecraft informed Wells of all of this [*i.e.* that Wells' desired grievances lacked merit] in his June 9 text message." Decision at 12:1-10. Whether the grievances would have had merit is of course relevant to the analysis of whether a Union, like the Branch here, reasonably concluded that they would not have.

The General Counsel also appears to argue that Wells desired' grievances would have had merit because while "cutting [Wells] hours in half…does not fall within the contractual regular duty, light duty, and limited duty" nevertheless "the National Agreement provides that

employees may work "other assignments.'" Exceptions at 10. The General Counsel misunderstands the National Agreement. Wells did not qualify for light duty not because light duty does not encompass reduced working hours, but because when Wells finally submitted a light duty request, she supported it with medical documentation indicating her condition was so limiting that there was no productive work she could do. With respect to "other assignments," the preambular language to the National Agreement's provision regarding light duty states that NALC and the USPS "agree to the following provisions and conditions for reassignment to temporary or permanent light duty or other assignments." Joint Ex. 1, Art. 13, § 1.B (p. 52).[6] There is no evidence in the record as to what this vague reference to "other assignments" might mean, and, of course, there are assignments other than temporary or permanent light duty, such as limited duty (for which Wells was also not eligible). Decision at 8 n.11.

Finally, the General Counsel asserts that "not following an agreed to schedule and then being removed from this schedule are legitimate matters that would cause any employee to seek and obtain assistance from its collective bargaining representative," Exceptions at 10. This point is irrelevant. The Branch explained to Wells that she was not entitled to work a four-hour shift absent an approved light duty request. The Branch assisted her in submitting such a request and grieving the Postal Service's denial of it, but because Wells then indicated she could only walk two hours a day, she could not do productive work within her restrictions and thus did not meet the requirements for light duty. It was Wells' ever-decreasing ability to do her job, not any action taken by the Branch, that caused her to lose her four-hour assignment, and her subsequent submission of documents that showed she could perform even less work that kept her from

[6] The General Counsel erroneously cites to Joint Exhibit 3 in its reference to the National Agreement.

getting it back.

CONCLUSION

For the foregoing reasons, the Exceptions are without merit and the Board should affirm the ALJ's Decision.

Dated: New York, New York
June 15, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing brief to be served this 15th day of June 2018 by first-class mail, postage prepaid, upon:

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